No. 83-619

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOSEPH C. GRAVES,

Petitioner,

v.

THE LEXINGTON HERALD-LEADER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Kentucky Supreme Court, in accordance with nearly two decades of decisions from this Court, correctly reversed the libel judgment in favor of a public official/public figure plaintiff against a media defendant after an independent examination of the record.

2. Whether the Kentucky Supreme Court correctly reversed the judgment where the plaintiff, a public official and a public figure, failed to show that the article in question was published with a reckless disregard for the truth.

In accordance with Supreme Court Rule 28.1, please be advised that Knight-Ridder Newspapers, Inc. is the parent company of the Respondent, The Lexington Herald-Leader Company. Knight-Ridder Newspapers, Inc. was named as a defendant in the Complaint, but was dismissed as a party defendant prior to trial. Howard Collins, editor of The Lexington Leader at the time the article in question was published, was a defendant at trial below, but the jury found no liability against him. Neither the reinstatement of Knight-Ridder Newspapers, Inc. as a party nor the issue of Howard Collins' liability was raised on appeal before the Kentucky Supreme Court, or in the Petition for Certiorari.

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OPINION BELOW

The opinion of the Supreme Court of Kentucky, issued December 28, 1982, is set forth in the Appendix filed by Petitioner at pages 1a through 25a. The Order of the Supreme Court of Kentucky, denying Joseph C. Graves' petition for rehearing, is set forth in the Appendix at page 26a.

COUNTERSTATEMENT OF THE CASE

This case is a defamation action brought against The

Lexington Herald-Leader Company for the July 21, 1977 publication of an article in The Lexington Leader, an afternoon Newspaper then published by the Respondent in Lexington, Kentucky.[1] While this action revolves around only one article, the determinative facts in this case cover a period of some eight months. Thus, close attention to the sequence of events underlying this case is merited. At the time the article was published, the Petitioner, Joseph C. Graves, was a state senator and a candidate for mayor of the Lexington-Fayette Urban County Government. (Transcript of Evidence, hereinafter referred to as "TR", 24). Graves, however, had been a fixture in local politics for some time. He had been in public office since 1967, serving as a city commissioner, state representative and state senator. (TR 19-21). During these years in public life, Graves had as a matter of course filed with the county clerk documents which he identified as financial statements and tax returns (TR 25-26). His stated purpose for filing them at the county courthouse was to apprise his constituents of the nature and extent of his personal finances. (TR 143).

At the time he announced his candidacy for mayor Graves was very much aware that his personal finances, particularly his family's real estate holdings in downtown Lexington, were a legitimate campaign issue. In fact, questions about these property holdings had been raised in earlier campaigns (TR 33), and both Graves and his staff anticipated that questions would again be raised during the mayoral race. (TR 67). Their concern was not unwarranted. Graves' holdings had been a matter of public controversy throughout his career and his reputation for integrity, honesty and ethical conduct had been of public interest in the past. (TR 178-228).

After announcing that he was running for mayor, Graves filed on January 31, 1977, documents dated January 15, 1977 identified as "Joe Graves' Balance Sheet" (TR 104). After

[1] At the time the article was published, The Lexington Herald-Leader Company published two newspapers, the morning Lexington Herald, and the afternoon Lexington Leader. It also published combined editions on Saturday and Sunday. The Respondent merged the two newspapers at the beginning of 1983 and now publishes a single morning daily newspaper called The Lexington Herald-Leader.

these documents were filed, Graves authorized his campaign press secretary to send copies to The Lexington Herald-Leader Company (TR 104).

Near this time, two Lexington lawyers, Robert S. Miller and Timothy Green, made an effort to supply various documents to a reporter of The Lexington Herald-Leader Company. (TR 497, 526-527). These documents pertained to the nature and extent of the Graves family holdings and to the alleged conflicts of interest that had surrounded Graves throughout his career. The reporter contacted by the attorneys was John Alexander, a veteran reporter who had been with The Lexington Herald-Leader Company for seventeen and one-half years (TR 613), and who was familiar with the reporting of courthouse stories (TR 615). He was not only experienced, but he had the confidence of each of his editors. (TR 320, 368, 380, 487).

Alexander began working on the story in the winter of 1977. He brought the story to the attention of his editors after the May primary. (TR 318). According to Howard Collins, who was then editor of The Lexington Leader, Alexander approached him in June, 1977 and mentioned the information he had been given. At that time, Alexander did not identify his sources (TR 319, 625). Collins apparently authorized Alexander to continue his investigation of Graves' property holdings. (TR 625).

A few weeks later, Alexander came to Collins with a list of questions he had prepared based on the documents and his own investigation. Alexander told Collins that the list represented areas about which he wanted to question Graves and that a meeting between Alexander, Collins and Graves had been arranged. (TR 321). Graves cancelled the meeting, and instead wrote a letter to Collins and Alexander dated July 6, 1977 (TR 322), in which he proposed that they attend a previously scheduled press conference on July 22 (TR 34, 429). Graves then left for vacation and became unavailable for comment (TR 33).

After receiving Graves letter, Alexander wrote a story and submitted it to Collins (TR 631). Collins received the story on

July 15, the day he was scheduled to leave for vacation (TR 323). Before his departure, he read the article, made some editing changes and gave it to Rich Schwein, then city editor of The Lexington Leader. (TR 371). Collins instructed Schwein to carefully edit the story and to continue efforts to get Graves to talk to representatives of The Lexington Herald-Leader Company (TR 324). Alexander was also about to go on vacation, but he remained in touch with the newspaper and continued his own efforts to contact Graves (TR 575, 488).

On July 20, Alexander pursued his efforts to contact Graves, even going to Graves' home. He ultimately went to Graves' campaign headquarters to impress upon his campaign manager "the urgency of some communication with him." (TR 576), (TR 357, 576, 662). On July 21, Collins, who was still on vacation, received a telephone call from Fain, asking whether the story should be published. While Collins gave publication approval, he also told Fain to continue to try to contact Graves. (TR 325, 365). Another reporter in addition to Fain was assigned to solicit Graves' comments (TR 475).

Graves did not dispute the fact that numerous attempts were made by The Lexington Herald-Leader Company to contact him. To the contrary, although Graves had returned from his vacation on July 19, he and his staff made a campaign decision not to give the Respondent's reporters an individual meeting. (TR 424, 433). Yet at that time, Graves was aware that there were mistakes in the January 15, 1977 "Joe Graves Balance Sheet". In fact, his staff was preparing a press release and a set of documents to correct omissions in that financial statement and to answer questions about potential conflicts of interest. (TR 407-436). In spite of this knowledge, Graves and his staff chose to make the candidate unavailable to answer those questions until the Respondent's reporters were on "our [Graves Campaign] ground" during the press conference. (TR 535).

On July 21, three editions of The Lexington Leader were printed by the Respondent. The article in question, entitled "Graves' Property List Apparently Inaccurate," did not appear until the final edition because of continuing efforts to get

Graves' comments. This edition went to press at 1:00 p.m. (TR 771, 789). Later that same afternoon, Graves' staff held a press conference to denounce the story. The staff also hand-delivered a letter, signed by Graves' campaign manager, to Creed Black, publisher of the Lexington Herald-Leader Company (TR 282). Black then contacted the employees who had been involved in its writing, editing and publishing. (TR 284-294, 768).

Graves held his press conference the following day, as scheduled. The packet of material on which his staff had been working during the newspaper's efforts to contact him was distributed. The packet contained an addendum to Graves' financial statement as originally filed, correcting errors, mistakes and omissions. (TR 435, 459). On July 22 and 23, The Lexington Herald Leader Company reported both the news conference and the reactions of Graves' staff to Alexander's article.

The same day that Graves held his news conference, The Lexington Herald-Leader Company held the first in a series of meetings to reassess Graves' actual interest in the properties. (TR 764). Black became aware that despite further attempts to get Graves to go over the material, Graves had no intention of doing so. (TR 295, 298). Black therefore determined that the only way to verify the figures used in the July 21 story was to "examine them ourselves one by one." (TR 298). Towards that end, he requested The Lexington Herald-Leader attorneys to look at the documents and ascertain Graves' ownership interest. (TR 306).

The Respondent's attorneys conducted a title examination and held meetings with Black, Collins and Alexander, during which the extent of Graves' real estate holdings was reexamined. (TR 764, 756). A letter outlining Graves' percentage interests was sent to Collins by the attorneys. (TR 756-757). At this point, The Lexington Herald-Leader was still attempting to get Graves' to comment on his property interests, but he would not meet with Black or Collins (TR 764). The research into ascertaining Graves' interests took some time, as did the newspaper's continuing efforts to contact Graves.

On August 5, 1977, The Lexington Leader published an

article entitled "Graves' Property Story Wrong", incorporating the attorneys' findings as to the figures contained in Alexander's story (TR 332). That same day, an editorial was published in The Lexington Leader apologizing to Graves for the July 21 article. (TR 334).

None of the parties responsible for the writing, editing or publishing of the Alexander article wrote either the August 5 correction or the editorial. Steve Wilson, who was then managing editor of The Lexington Leader, took responsibility for writing the correction. (TR 333). Bill Hanna, associate editor of The Lexington Leader, wrote the editorial (TR 334). Further, as a result of their investigation, Black and Collins had concluded that the editors involved in the original article had improperly edited it and that Alexander should be discharged. Collins took the following remedial action: on July 30, Alexander was dismissed; both Schwein, the city editor and Alexander's direct supervisor, and Bette Pierce, the assistant city editor, were demoted.

Following the August 5 news story and editorial, Collins still had questions concerning the nature and extent of Graves' property holdings. (TR 348). Since Graves had said publicly that he would be glad to meet with an interviewer following the August 5 publications, Collins hoped that a meeting could be arranged. (TR 350). His efforts to talk to Graves were once again thwarted by Graves and his staff, and no one from The Lexington Herald-Leader Company was ever able to question Graves about his property holdings (TR 349-352, 765-766).

The Complaint was filed in the Fayette Circuit Court on July 19, 1978 and the matter came to trial on July 13, 1981. At trial, every witness who was asked testified that Alexander had never questioned his story's accuracy. (TR 305, 347, 365, 367, 379, 381, 487, 513, 554, 755, 769, 788). Alexander testified that his only doubt about the story's completeness, (TR 572), arose solely from the fact that he had been unable to discuss the documents with Graves (TR 575, 645). He stated unequivocally that he was writing the best story he could and that he

believed his story was factually true. (TR 639, 653). Further, Alexander testified that "he did not knowingly write anything false." (TR 687).

After motions for directed verdicts were overruled, the jury found unanimously that not all of the statements of fact contained in the July 21 article were substantially true, and that the false statements of fact were defamatory. The jury returned a nine-to-three verdict that The Lexington Herald-Leader Company or some of its employees had published the July 21 article with "actual malice" and awarded damages to Graves in the amount of $100,000 (TR 841-43).

The Lexington Herald-Leader Company appealed and the Kentucky Supreme Court reversed, by a five-to-two vote. (Petitioner's App. 18a). The issue on appeal was "whether the evidence in the record is sufficient to support the jury's finding that the article was published with actual malice, as defined in *New York Times Co. v. Sullivan.*" (Petitioner's App. 10a). In so reviewing the evidence, the Kentucky Court noted that since *New York Times v. Sullivan,* 376 U.S. 254 (1964), appellate courts are under a mandate to "make an independent examination of the whole record, . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." (Petitioner's App. 10a). The Kentucky Court carefully pointed out that such a *de novo* review did not mean that it was free to disregard the jury's verdict. Rather, it recognized its duty to draw "all permissible inferences in the Plaintiff's favor" and to resolve "all questions of credibility in his behalf." (Petitioner's App. 11a).

The Kentucky Court nonetheless held that the proof presented on the issue of actual malice lacked "the convincing clarity" required by *Sullivan.* (Petitioner's App. 11a). In so doing, the Appellate Court noted that decisions of this Court following *Sullivan* had further defined actual malice to mean that the defendant published the article despite having had "a conscious awareness of probable falsity" or having "in fact

entertained serious doubts as to the truth of his publication." (Petitioner's App. 13a).[2] Looking at the record below, the Kentucky Court found that Alexander's doubts about his story were not about the accuracy of his analysis of Graves' property holdings. Instead, the Court found that Alexander's concerns stemmed solely from his inability to get Graves' comments, which did not rise to "a high degree of awareness of [the] probable falsity of the article." (Petitioner's App. 14a). The Opinion noted that while the First Amendment is not served by lies or false statements, neither would it be served by affirming the judgment below on the evidence in the record. (Petitioner's App. 18a).

Graves sought a rehearing of the appellate ruling, but his petition was denied. (Petitioner's App. 26a).

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

Under the considerations set forth in U.S. Sup. Ct. R. 17, the decision of a state court of last resort may be reviewed when it has decided a federal question in a way which conflicts with decisions of this Court, a federal court of appeals or another state court of last resort. Graves' case presents none of these three situations, nor does his petition offer any other valid reasons for this Court to grant review.

For nearly two decades, following its decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), this Court has adhered to a doctrine of appellate review as a means of reversing defective judgments subject to constitutional principles. In accordance with this mandate, both lower federal and state courts have almost uniformly applied a heightened standard of appellate review in constitutional libel actions. Petitioner's tortured assertions to the contrary badly miss the mark. The review of the record by the Kentucky Supreme Court was wholly consistent with *Sullivan* and its progeny.

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[2] Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Beckley Newspaper Corp. v. Hanks, 389 U.S. 81 (1967); St. Amant v. Thompson, 390 U.S. 727 (1968).

Further, the Kentucky Court's rendering of a decision based on insufficient proof of "actual malice" was similarly consistent with decisions of this Court. The state court's definition of "reckless disregard for the truth" does not require a public official or public figure to prove falsity, and Petitioner's argument to that effect is based on a misreading of the opinion.

Petitioner's other arguments likewise fail to show any deviation by the Kentucky Court from the accepted and usual course of judicial proceedings. This case utterly fails to merit this Court's further attention.

1. DECISIONS OF THIS COURT, AS WELL AS DECISIONS IN LOWER FEDERAL AND STATE COURTS, MANDATE AN INDEPENDENT APPELLATE REVIEW IN CONSTITUTIONAL LIBEL ACTIONS, PARTICULARLY WHERE THE LEGAL ISSUE UNDER CONSIDERATION IS ACTUAL MALICE

Petitioner contends that this case presents "the question of the extent to which an appellate court may re-examine the evidence presented to a jury in a public figure libel case." (Petition, p. 11). He further contends that this same issue is already before this Court in a federal bench trial context in *Bose v. Consumer's Union of United States,* No. 82-1246 (October Term, 1982), *cert. granted,* 103 S. Ct. 1872 (1983), *opinion below,* 692 F.2d 189 (1st Cir. 1982). (Petition, p. 11). Petitioner's attempt to analogize the instant case to *Bose* is utterly unwarranted because the two cases bear no resemblance to each other.

As Petitioner admits, *Bose* is a product disparagement case (Petition, p. 11), while the instant case revolves around a candidate for public office. The stake of a vital democratic society and its people in the public business and in the conduct of public officials and candidates for such offices is necessarily involved in an article about a political candidate. *St. Amant v. Thompson,* 390 U.S. 327, 371 (1968). Manifestly, no such stake is involved in a consumer review of a stereo loudspeaker system. Moreover, it is clear that at least one concern before this Court in *Bose* must be the issue of whether the review was

an expression of fact or an expression of constitutionally protected opinion under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). No such issue is presented by the petition here. The fact that this Court granted review in *Bose* does not lead *ipso facto* to a conclusion that review is likewise appropriate in the instant case.

More importantly, petitioner ignores the fact that since *New York Times v. Sullivan*, this Court has unequivocally mandated independent appellate review in public figure libel cases.[3] Time and again, this Court has adhered to the principle that an appellate court's duty goes beyond the mere elaboration of constitutional principles:

> [W]e must also in proper cases review the evidence to make certain that those principles have been constitutionally applied . . . [and] 'examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect' . . . We must 'make an independent examination of the whole record' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

New York Times v. Sullivan, 376 U.S. at 285 [citation and footnote omitted].

One of the Court's last pronouncements on the role of an appellate court in a public offical/public figure libel case was in *Time, Inc. v. Pape*, 401 U.S. 279 (1971). In *Pape*, the plaintiff was a public official by virtue of his position as Deputy Chief of

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[3] Rosenblatt v. Baer, 383 U.S. 75 (1966); Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967); Associated Press v. Walker and Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967); Time, Inc. v. Hill, 385 U.S. 374 (1967) (invasion of privacy); St. Amant v. Thompson, 390 U.S. 727 (1968); Greenbelt Cooperative Publishing Ass'n. v. Bresler, 378 U.S. 6 (1970); Rosenbloom v. Metromedia, 403 U.S. 29 (1971); Time, Inc. v. Pape, 401 U.S. 279 (1971); National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974) (libel claim under federal labor laws).

Detectives of the Chicago Police Department. When that case ultimately came before this Court, the only issue was whether the appellate court had correctly applied the actual malice doctrine to the facts before it. In ruling on that issue, the Court specifically referred to the "settled principle" that in cases where constitutional rights are allegedly denied, the appellate court must re-examine the evidentiary basis on which the lower court decision was founded. It further noted:

> [I]n cases involving the area of tension between the First and Fourteenth Amendments on the one hand, we have frequently had occasion to review 'the evidence in the . . . record to determine whether it could constitutionally support a judgment' for the plaintiff.

401 U.S. at 284 (citations omitted). Thus, the Kentucky Supreme Court did not act in contravention of this Court's constitutional libel decisions, but wholly in accord with them.

Further, it must be remembered that this Court's adoption of a heightened appellate review in *New York Times v. Sullivan* was not without precedent. The Supreme Court had previously mandated independent appellate review to assure the protection of constitutional rights in many contexts, including cases involving obscenity, freedom of assembly, disorderly conduct, boycott, contempt of court, freedom of expression in public schools and expression of rights of public employees.[4] In the years following *Sullivan*, this Court has continued to require an independent review in cases involving constitutional rights. Thus, as recently as April, 1983, in *Connick v. Myers*, 51 U.S.L.W. 4436 (1983), a case involving public employees, this Court reiterated the mandate that has compelled appellate courts to independently review the record in cases involving the First Amendment:

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[4] *See, e.g.* Jacobellis v. Ohio, 378 U.S. 184, 189 (1964) (obscenity); Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (assembly); Niemotko v. Maryland, 340 U.S. 268, 271 (1950) (disorderly conduct); Pennekamp v. Florida, 328 U.S. 331, 335 (1946) (contempt).

> The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which require interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they are made to see whether or not they . . . are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect.

51 U.S.L.W. at 4439, p. 10 (citations omitted).

Finally, despite Petitioner's labored contention that *Gertz v. Robert Welch, Inc., supra,* sounded the death knell for independent appellate review, he grievously misconstrues the case. *Gertz* was not granted certiorari for the purpose of questioning the appellate court's independent review, since this Court assumed therein that the Seventh Circuit had correctly found insufficient evidence in the record of actual malice. Instead, this Court took *Gertz* to consider the appropriate standard of liability for private figures, and only that point was before the Court. Whatever the scope of review now appropriate in *private figure* cases, the inescapable fact is that the doctrine of independent appellate review in *public official-/public figure actual malice* cases has been left intact.[5] Petitioner's attempts to avoid that fact are totally without merit. In reviewing the record below, therefore, the Kentucky Supreme Court did not usurp the function of the jury. Instead, it followed

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[5] Further proof of this Court's adherence to this doctrine is found in National Association of Letter Carriers v. Austin, 418 U.S. 264 (1974), decided the same day as *Gertz*. *Austin* involved a libel claim brought under federal labor laws and the standard of proof was actual malice. This Court once again echoed its prior mandate to make an independent examination of the whole record in order to ensure that constitutional rights were properly protected. 418 U.S. at 282.

the long and honored mandate of this Court[6] that the jury may not be allowed to reach a conclusion which is inconsistent with the United States Constitution. The Kentucky Supreme court was required to do no less.[7]

2. THE HOLDING OF THE KENTUCKY SUPREME COURT THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF ACTUAL MALICE WAS ENTIRELY CONSISTENT WITH *NEW YORK TIMES V. SULLIVAN* AND ITS PROGENY

It was undisputed at trial that Graves was, at minimum, a public figure and that his burden under *New York Times Co. v. Sullivan* was to prove that The Lexington Herald-Leader Company published the July 21, 1977 article with actual malice. The Kentucky Supreme Court's recitation of the refinement given the term "actual malice" in the years since *Sullivan* is

[6] Nor can any credence be given to Petitioner's assertion that there is sufficient confusion in the federal courts to warrant review under U.S. Sup. Ct. R. 17(b). Independent appellate review in constitutional libel cases has been nearly universally accepted in the lower federal courts. *See, e.g.* Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), *cert. denied,* 429 U.S. 1062 (1977); Baldine v. Sharon Herald Company, 391 F.2d 703 (3rd Cir. 1968); Ryan v. Brooks, 634 F.2d 726 (4th Cir. 1980); Long v. Arcell, 618 F.2d 1145 (5th Cir. 1980), *cert. denied,* 449 U.S. 1083 (1981); Orr v. Argus-Press, 586 F.2d 1108 (6th Cir. 1978), *cert, denied,* 440 U.S. 960 (1979); Gertz v. Robert Welch, Inc., 471 F.2d 801 (7th Cir. 1972), *rev'd on other grounds,* 418 U.S. 323 (1974); Pauling v. Globe-Democrat Publishing Co., 362 F.2d 188 (8th Cir. 1966), *cert. denied,* 388 U.S. 909 (1967); Cher v. Forum International, Ltd., 692 F.2d 634 (9th Cir. 1982), *cert. denied,* 51 U.S.L.W. 3883 (1983) and Davis v. Schuchat, 510 F.2d 731 (D. C. Cir. 1975).

Moreover, Guam Federation of Teachers v. Ysrael, 492 F.2d 438 (9th Cir. 1974), *cert. denied,* 419 U.S. 872 (1974), was miscited by Petitioner for the proposition that independent appellate review is not required under *Sullivan. Guam* cited *Sullivan* in regard to independent review and language indicating otherwise was specifically limited to the question of directing a verdict.

[7] In E. W. Scripps Co. v. Cholmondelay, 569 S.W.2d 700 (Ky. App. 1978), the Kentucky Court recognized that after *Gertz,* states may not allow punitive damages unless actual malice is proven. In overturning the award of punitive damages, the Court looked at the "whole record," finding that the record had not indicated substantial evidence of actual malice. 569 S.W.2d at 703, 704. Thus, Kentucky appellate courts have a tradition of independent review where there is an actual malice standard.

entirely correct and stands unrefuted by Petitioner. Petitioner's only quarrel is with the Kentucky Court's final choice of words; i.e.: that "liability may rest only on conduct which approaches the level of deliberate fabrication . . . " (Petitioner's App. 14a).

In making his argument, Petitioner has ignored the obvious. The operative word in the Kentucky Court's definition is *"approaches"*. Even a cursory reading of the court's phrasing indicates that a libel defendant can incur liability well *before* the point of deliberate fabrication. Moreover, Petitioner has also ignored the state court's full explanation of its formulation: that "the defendant must entertain serious doubts (i.e.: be consciously aware of his allegations' probable falsity) and publish despite those serious doubts." (Petitioner's App. 14a). Far from straying from the intent of *Sullivan, St. Amant v. Thompson* and *Curtis Publishing Co. v. Butts,* the Kentucky Court echoed the words of this Court in reaching the result it did. Thus, a public official or public figure in Kentucky is required to prove no more than this Court has required for almost twenty years.

Moreover, the Kentucky Supreme Court's review of the evidence clearly refutes Petitioner's contention that the verdict was overturned only because he could not demonstrate conscious falsity on the part of The Lexington Herald-Leader Company. To the contrary, the verdict was overturned because Petitioner failed to demonstrate a reckless disregard for the truth.

Petitioner makes much of the fact that the Kentucky Supreme Court was required to accept Alexander's testimony as credible and to resolve all inferences in the plaintiff's favor. (Petition p. 20). There is absolutely no evidence that the Kentucky Court did otherwise. While Petitioner would have this Court believe to the contrary, the fact remains that every editor connected with the July 21, 1977 article had confidence in Alexander's ability as a reporter. None of them had any reason to belive that Alexander needed assistance with the legal documents in his possession, since he had already ascertained

the percentage of Graves' property holdings. (TR 632). Alexander testified at trial that he believed his story was factually true and that his only doubts stemmed from his inability to discuss the subject matter with Graves himself. (TR 575, 639, 645, 652-653).

Nor did the Kentucky Court err in its finding that The Lexington Herald-Leader Company was not required to postpone publication until after Graves' press conference. (Petitioner's App. 16a). First, the presence of "hot news" would have been a justification from the standpoint of Alexander's superiors, but the jury itself found that Howard Collins, the editor, had not published the article with actual malice. Since there was, even from the jury's standpoint, insufficient evidence of actual malice on that point in the record, the existence or nonexistence of hot news is therefore not at issue.

Even if this were a hot news case, it became one solely because of Graves' politically motivated desire to confine any inquiry into conflict of interest charges to a press conference. Yet the record is replete with evidence that rather than ignoring "elementary precautions", *Curtis v. Publishing Co. v. Butts, supra,* The Lexington Herald-Leader Company did everything it could to get Graves' comments. Not only was another reporter sent to get a comment from Graves (TR 475), but the decision to publish was made fifteen minutes after the normal deadline (TR 477). Following publication, the Respondent made concerted and continued efforts to get Graves' side of the story (TR 349-352, 765-766). These efforts simply did not exhibit a "reckless 'I-don't-care-about-the-truth' state of mind" which would have met the actual malice standard. *Orr v. Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978), *cert. denied,* 440 U.S. 960 (1979).

The Kentucky Court was also correct in holding that the existence of two of Graves' political enemies as Alexander's sources was insufficient proof of actual malice. (Petitioner's App. 15a-16a). Unlike the evidence in *St. Amant v. Thompson, supra,* the record in the instant case did not show that Alexander relied solely on his sources or that he failed to try to verify the documents on his own. There was no evidence that the story was completely fabricated or that the allegations were so "inherently improbable that only a reckless man would have put them in circulation." *St. Amant v. Thompson,* 390 U.S. at 732. It should be noted that Graves' own staff ultimately filed an addendum to his January 15, 1977 property schedule. Respondent should not be punished for publishing an article based on the original list which was, at minimum, incomplete. (TR 125-126, 135, 435, 439). Reckless disregard for the truth of the article in question was not proven with convincing clarity.

Finally, despite Petitioner's assertions, neither his constitutional rights nor those of the electorate were denied by the Kentucky Supreme Court. Petitioner's contentions on these grounds are disingenuous. This Court has already recognized in *New York Times v. Sullivan* that the Seventh Amendment does not preclude an appellate court from reviewing a state court decision to determine if a federal right has been adequately protected. 376 U.S. at 285, n. 26. The review of a jury verdict in a libel case is not a violation of the Fourteenth Amendment, but a protection of the First Amendment. Therefore, whether a cause of action is "property" for due process purposes is irrelevant to Graves' petition for certiorari.

Petitioner's assertion of the rights of the electorate is equally specious. Petitioner's standing to argue on behalf of the public at large is on shaky ground. *Cf. Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977). Even if Petitioner has the requisite standing, there is no evidence that the public's right to an effective, unimpeded vote was undermined by the July 21, 1977 article. Graves' campaign manager declined to say at trial that the election outcome would have been different had the article not been printed (TR 393). Moreover, this Court has made it clear that

a candidate for public office cannot claim malice simply because aspects of his life have been examined in print and presented to the voting public:

> The principal activity of a candidate in our political system, his 'office,' so to speak, consists in putting before the voters every conceivable aspect of his public and private life that he thinks may lead the electorate to gain a good impression of him. A candidate who, for example, seeks to further his cause through the prominent display of his wife and children can hardly argue that his qualities as a husband or father remain of 'purely private' concern. And the candidate who vaunts his spotless record and sterling integrity cannot convincingly cry 'Foul!' when an opponent or an industrious reporter attempts to demonstrate the contrary.

Monitor Patriot Co. v. Roy, 401 U.S. 265, 274 (1971). Petitioner may have been dissatisfied with the outcome of the election, but there is no evidence that the outcome represented anything but the will of the electorate. His loss was a matter of public choice and clearly not attributable to any "reckless disregard" on the part of The Lexington Herald-Leader Company.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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